No. _____

In the
Supreme Court of the United States

MARK DOUGLAS ROBISON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Fourteenth Court of Appeals of Texas at Houston

PETITION FOR WRIT OF CERTIORARI

Gary Udashen
Counsel of Record
Texas Bar No. 20369590
gau@udashenanton.com

Brett Ordiway
Texas Bar No. 24079086
brett@udashenanton.com

Udashen Anton
2311 Cedar Springs Road, Suite 250
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In considering whether a criminal-defense attorney's deficient performance was prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984), is all that matters whether the deficient performance affected the trial's outcome? Or does it matter if it rendered the trial fundamentally unfair?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED PROCEEDINGS

- *State v. Robison*, No. 1324897, 351st District Court, Harris County, Texas (judgment entered June 21, 2013)
- *State v. Robison*, No. 1324898, 351st District Court, Harris County, Texas (judgment entered June 21, 2013)
- *State v. Robison*, No. 1324899, 351st District Court, Harris County, Texas (judgment entered June 21, 2013)
- *Robison v. State*, No. 14–13–00682–CR (Tex. App.—Houston [14th Dist.] 2015) (memorandum opinion filed and judgment entered January 22, 2015)
- *Robison v. State*, No. 14–13–00683–CR (Tex. App.—Houston [14th Dist.] 2015) (memorandum opinion filed and judgment entered January 22, 2015)
- *Robison v. State*, No. 14–13–00684–CR (Tex. App.—Houston [14th Dist.] 2015) (memorandum opinion filed and judgment entered January 22, 2015)

- *Robison v. State*, PD-0214-15 (Tex. Crim. App. 2015) (discretionary review refused and judgment entered April 22, 2015)
- *Robison v. State*, PD-0215-15 (Tex. Crim. App. 2015) (discretionary review refused and judgment entered April 22, 2015)
- *Robison v. State*, PD-0216-15 (Tex. Crim. App. 2015) (discretionary review refused and judgment entered April 22, 2015)
- *Ex parte Robison*, 1324897–B, 351st District Court, Harris County, Texas (habeas application denied and judgment entered December 12, 2016)
- *Ex parte Robison*, 1324898–B, 351st District Court, Harris County, Texas (habeas application denied and judgment entered December 12, 2016)
- *Ex parte Robison*, 1324899–B, 351st District Court, Harris County, Texas (habeas application denied and judgment entered December 12, 2016)
- *Ex parte Robison*, No. 14–17–00475–CR (Tex. App.—Houston [14th Dist.] 2017) (memorandum opinion filed and judgment entered June 22, 2017)
- *Ex parte Robison*, No. 14–17–00476–CR (Tex. App.—Houston [14th Dist.] 2017) (memorandum opinion filed and judgment entered June 22, 2017)
- *Ex parte Robison*, No. 14–17–00477–CR (Tex. App.—Houston [14th Dist.] 2017) (memorandum opinion filed and judgment entered June 22, 2017)

- *Ex parte Robison*, No. 14-18-00027-CR (Tex. App.—Houston [14th Dist.] 2019) (memorandum opinion filed and judgment entered January 29, 2019)
- *Ex parte Robison*, No. 14-18-00028-CR (Tex. App.—Houston [14th Dist.] 2019) (memorandum opinion filed and judgment entered January 29, 2019)
- *Ex parte Robison*, No. 14-18-00029-CR (Tex. App.—Houston [14th Dist.] 2019) (memorandum opinion filed and judgment entered January 29, 2019)
- *Ex parte Robison*, PD-0184-19 (Tex. Crim. App. 2019) (discretionary review refused and judgment entered May 8, 2019)
- *Ex parte Robison*, PD-0185-19 (Tex. Crim. App. 2019) (discretionary review refused and judgment entered May 8, 2019)
- *Ex parte Robison*, PD-0186-19 (Tex. Crim. App. 2019) (discretionary review refused and judgment entered May 8, 2019)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES AND RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Douglas Robison respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals of Texas at Houston.

OPINIONS BELOW

The Fourteenth Court of Appeals's opinion is unpublished but can be found at *Ex parte Robison*, 14-18-00027-CR, 14–18–00028–CR, 14–18–00029–CR, 2019 WL 347408 (Tex. App.—Houston [14th Dist.] January 29, 2019). It is also attached to this petition as Appendix A. The Texas Court of Criminal Appeals's May 8, 2019, orders refusing review are unpublished but can be found on the court's website's "Case Search" page, case numbers PD-0184-19, PD-0185-19, PD-0186-19. They also are attached to this petition as Appendix C.

JURISDICTION

The Texas Court of Criminal Appeals, the highest court of Texas in which a decision could be had, refused Robison's petitions for discretionary review on May 8, 2019. *See* PD-0184-19, PD-0185-19, PD-0186-19; Appendix C. This Court thus has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to… have the Assistance of Counsel for his defence."

U.S. Const. amend VI. The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. Robison's Arrest and Trial

An investigator with the Harris County, Texas, constable's office discovered that Robison's personal computer had accessed a peer-to-peer network and downloaded a picture of a child engaged in a sexual act. The investigator applied for and obtained a warrant to search Robison's residence for evidence of child pornography, and, upon executing the warrant, officers found a folder on Robison's computer containing thousands of files of child pornography.

The State of Texas prosecuted Robison for possessing three of the child-pornography files. At his trial, he testified and admitted that he knowingly possessed the files, but he explained that it was for a bona fide educational purpose. *See* Tex. Pen. Code § 43.26(c) (stating "The affirmative defenses provided by Section 43.25(f) also apply to a prosecution under this section."); Tex. Pen. Code § 43.25(f)(2) (stating it is an affirmative defense that "the conduct was for a bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose"). Robison explained that, after learning that his wife and

cousin were sexually abused, he had realized that, as a child, he too was abused. He then authored two books addressing the subject, both of which he attempted to offer into evidence: first, a 1992 self-published collection of poems titled *Man to Man: Poems for Men*, addressing themes such as "right and wrong" and "nastiness" in the world; second, a 2013 self-published educational book, co-authored with his wife and released after Robison was indicted but before his trial began, titled *HELP US PLEASE: What YOU Can Do To Eradicate Sexual Abuse and Child Pornography*. The trial court excluded both books. Robison further testified that he tried to increase awareness of child sexual abuse by co-hosting a radio program that discussed the subject. Robison and his wife also created a website called the "Museum of Sexual Abuse," providing visitors with a forum to submit personal stories of abuse. Robison testified that he believed "abuse belongs in a museum, not in our lives."

The State in response urged that Robison manufactured all this evidence in an attempt to avoid punishment for downloading child pornography. The State pointed to Robison's failure to approach law enforcement, a university, a peer review group, or an attorney before or during his alleged research. Additionally, the State introduced evidence that Robison saved thousands of pornographic images but no scholarly articles. Most significantly, though, after Robison testified and explained why he possessed the child pornography, the trial prosecutor cross-examined him as to why it was the first the State had heard of his defense. He was silent during the execution of the search warrant, the State noted, and never mentioned

his defense during several pretrial hearings. The prosecutor "elicited testimony that [Robison] had appeared for eleven pretrial hearings, and on each of those occasions, he never once approached her to explain that he had been researching child pornography for a bona fide educational purpose." *Robison*, 2019 WL 347408 at *4. Robison's counsel did not object "to the improper criticisms of [Robison's] in-court silence," and the jury found Robison guilty of all three counts. *Robison v. State*, 461 S.W.3d 194, 206 (Tex. App.—Houston [14th Dist.] April 22, 2015).

2. The Texas court of appeals recognized that Robison's trial counsel performed deficiently. But considering only whether counsel's deficient performance affected the trial's outcome, the court held that counsel's deficient performance was not prejudicial.

On direct appeal to Texas's Fourteenth Court of Appeals, Robison argued that, among other things, trial counsel's failure to object amounted to ineffective assistance. *Robison v. State*, 461 S.W.3d 194, 206 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). The court "agree[d] that counsel's performance was deficient." *Id.* The court was "not persuaded, however, that the outcome of the trial would have been different but for counsel's failure to object." *Id.* The court reasoned that "[t]he jury heard testimony that [Robison] was silent during the execution of the search warrant and that he had not mentioned to his wife that he had been researching child pornography." *Id.* "That evidence of pre-arrest silence, which was admissible for impeachment purposes, had already cast serious doubt

on appellant's credibility." *Id.* Robison then filed a petition for discretionary review with the Texas Court of Criminal Appeals. The court refused the petition without comment.

In state habeas applications, Robison then again urged that his counsel was ineffective in failing to object to the State's comments on his post-arrest silence. *Ex parte Robison*, 14-18-00027-CR, 2019 WL 347408, at *2. (Tex. App.—Houston [14th Dist.] Jan. 29, 2019, pet. ref'd). In response, the State argued that issues raised and rejected on direct appeal may not be reconsidered on a post-conviction writ. *Id.* at *3 (citing *Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim. App. 1993) ("Habeas corpus is traditionally unavailable to review matters which were raised and rejected on appeal.")). But though this rule doesn't apply where "direct appeal cannot be expected to provide an adequate record to evaluate the claim in question"[1]—and as this Court has recognized, "Texas procedure makes it 'virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim' on direct review"[2]—the habeas court denied relief on this basis. *Id*.

Robison again appealed to the Fourteenth Court of Appeals. "For the sake of argument," the court "assume[d] without deciding that [he] was allowed to re-litigate his claims" via habeas. *Id.* Again, though,

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[1] *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

[2] *Trevino v. Thaler*, 133 S. Ct. 1911, 19181044 (2013) (quoting *Robinson v. State,* 16 S.W.3d 808, 810–811 (Tex. Crim. App. 2000)).

the court held that Robison had not "establish[ed] that the outcome of the trial would have been different but for counsel's failure to object." *Id.* at *5. Robison then again petitioned the Court of Criminal Appeals to exercise its discretionary review, explaining that this was an improperly narrow application of *Strickland*'s prejudice prong. Appendix D. The court again refused Robison's petition. Appendix C.

REASONS FOR GRANTING THE WRIT

1. There's more to *Strickland*'s prejudice analysis than an outcome-determinative test.

In twice concluding that Robison's trial attorney's deficient performance was not prejudicial under *Strickland*, the Texas court of appeals explained that it was "not persuaded… that the outcome of the trial would have been different but for counsel's failure to object." *Robison v. State*, 461 S.W.3d 194, 206 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Robison "could not prevail on this claim of ineffectiveness," the court reasoned, without establishing that the outcome of the trial would have been different but for counsel's failure to object." *Ex parte Robison*, 14-18-00027-CR, 2019 WL 347408, at *5 (Tex. App.—Houston [14th Dist.] Jan. 29, 2019, pet. ref'd).

To be sure, "[i]n the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (quoting *Strickland*, 466 U.S. at 694). But as this Court recognized in *Weaver*, "the *Strickland* Court cautioned

that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Id.* (quoting *Strickland*, 466 U.S. at 696). To the contrary, "[a] number of practical considerations are important for the application of the standards we have outlined." *Strickland*, 466 U.S. at 696. Most importantly, "when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 696). Accordingly, this Court in *Weaver* "assume[d]" that "under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." *Id.*; *see also Hernandez v. Thaler*, 398 Fed. Appx. 81, 84 (5th Cir. 2010) ("A reasonable probability is one that is sufficient to undermine confidence in the outcome, but prejudice may also occur if 'the result of the proceeding was fundamentally unfair or unreliable.'"). Understandably, then, since this Court's assumption, numerous state and federal courts have continued to embrace this theory of *Strickland* prejudice.[3]

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[3] *See Dixon v. Burt*, No. 17-2292, 2018 WL 2016252, at *2 (6th Cir. Apr. 30, 2018) ("to establish prejudice for failing to object to a public-trial violation, a petitioner must show 'either a reasonable probability of a different outcome in his or her case or . . . show that the particular public-trial violation is so serious as to render his or her trial fundamentally unfair.'") (quoting *Weaver*, 137 S. Ct. at 1911); *Pirela v. Horn*, 710 Fed. Appx. 66, 83 n.16 (3d Cir. 2017) (petitioner failed to establish prejudice in claim of ineffective assistance for waiving a jury because petition could not "show either a reasonable probability of a different outcome in his case, or that the error was 'so serious as to render his . . . trial

fundamentally unfair.'") (quoting *Weaver*, 137 S. Ct. at 1911); *Newton v. State*, 455 Md. 341, 357, 168 A.3d 1, 10 (2017), ("Newton can establish prejudice two ways. He can either show that: (1) but for his attorney acquiescing to the alternate's presence during deliberations, the outcome of his trial would have been different; or (2) that the alternate's presence in the jury room rendered his trial fundamentally unfair."); *State v. Calvert*, 2017 UT App 212, 407 P.3d 1098, 1111 (" . . . where an unpreserved claim of structural error is challenged through the framework of ineffective assistance of counsel, prejudice is not presumed. Instead, the defendant must demonstrate 'either a reasonable probability of a different outcome in his or her case' or 'show that the particular . . . violation was so serious as to render his or her trial fundamentally unfair.'") (quoting *Weaver*, 137 S. Ct. at 1910-11); *Ledet v. Davis*, 4:15-CV-882-A, 2017 WL 2819839, at *14 (N.D. Tex. June 28, 2017) ("The burden is on the defendant to show either a reasonable probability of a different outcome in his case or that the particular public-trial violation was so serious as to render his trial fundamentally unfair."); *Monreal v. State*, 546 S.W.3d 718, 728 (Tex. App.—San Antonio 2018, pet. ref'd) ("We, therefore, consider whether appellant showed prejudice under *Strickland* and whether trial counsel's failure to object rendered appellant's trial fundamentally unfair."); *Guzman-Correa v. United States*, CR 07-290 (PG), 2018 WL 1725221, at *6 (D.P.R. Mar. 29, 2018) ("However, to demonstrate prejudice, Guzman-Correa must still show a reasonable probability of a different outcome but for counsel's failure to object to the closure or that such failure by counsel rendered his trial fundamentally unfair."); *Commonwealth v. Gaines*, 577 WDA 2017, 2018 WL 2188978, at *3 (Pa. Super. Ct. May 14, 2018) (" . . . a defendant raising a public trial violation via an ineffective assistance claim must satisfy the prejudice prong of the ineffectiveness test by showing either a reasonable probability of a different outcome in the case, or that the particular violation was so serious as to render the trial fundamentally unfair."); *Roberts v. State*, 535 S.W.3d 789, 797 (Mo. Ct. App. 2017) (" . . . the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case, or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.") (quoting *Weaver*, 137 S. Ct. at

Texas's Fourteenth Court of Appeals thus should not have rejected Robison's ineffectiveness claim solely on the basis that he had not shown that counsel's deficient performance changed the outcome. The court should have also considered whether counsel's deficient performance resulted in a fundamentally unfair trial.

2. The conflict between the Texas court of appeals's holding and other state and federal courts' holdings warrants this Court's review, and this case is an ideal vehicle to resolve the conflict.

This Court should grant this petition to resolve this conflict among state and federal courts concerning the Sixth Amendment's guarantee of the right to the assistance of defense counsel. U.S. Const. amend VI. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); U.S. Sup. Ct. R. 10(b) (in determining whether to grant certiorari,

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1910-11); *Matter of Salinas*, 189 Wash. 2d 747, 761, 408 P.3d 344, 350 (2018) ("the burden is on defendant to show a reasonable probability of a different trial outcome or to show that the particular public trial violation was so serious as to render his trial fundamentally unfair."); *Njonge v. Gilbert*, C17-1035 RSM, 2018 WL 1737779, at *12 (W.D. Wash. Apr. 11, 2018) ("In seeking to prove prejudice under *Strickland* for such a claim, Petitioner is afforded the option of proving either (1) a reasonable probability that a different outcome would have resulted, or (2) that the error resulted in fundamental unfairness.").

this Court will consider whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"). And indeed, this case presents an important Sixth Amendment question. Though the State of Texas egregiously denied Robison his constitutional right to remain silent, his counsel said nothing. *See* U.S. Const. amend. V.

This case is also a particularly good vehicle for addressing the question presented. The Texas court of appeals directly and plainly held that Robison "could not prevail on this claim of ineffectiveness" unless he "establish[ed] that the outcome of the trial would have been different but for counsel's failure to object." *Robison*, 2019 WL 347408 at *5. And the question presented is likely outcome-determinative in this case: the Texas court of appeals held that counsel's performance was deficient; if it was prejudicial, Robison's convictions must be reversed. *See Strickland*, 466 U.S. at 687. This case is thus an ideal vehicle to resolve the question presented.

CONCLUSION

In considering the prejudice from Robison's trial attorneys' failure to object to improper criticisms of Robison's in-court silence, the Texas court of appeals considered only whether the outcome of Robison's trial would have been different but for counsel's failure to object. Because there's more to *Strickland*'s prejudice prong, and because the Texas court's decision conflicts with other state and federal courts', Robison urges this Court to grant certiorari.

Respectfully submitted,

Gary Udashen
Counsel of Record
Texas Bar No. 20369590
gau@udashenanton.com

Brett Ordiway
Texas Bar No. 24079086
brett@udashenanton.com

Udashen Anton
2311 Cedar Springs Road
Suite 250
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)

Counsel for Petitioner